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No. 84-1248

In The
Supreme Court of the United States
October Term, 1984

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VILLAGE PUBLISHING CORPORATION,
Appellant,

vs.

NORTH CAROLINA DEPARTMENT OF REVENUE,
Appellee.

—o—

On Appeal From The
Supreme Court of North Carolina

—o—

MOTION TO DISMISS APPEAL

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QUESTIONS PRESENTED

I. DOES IMPOSITION OF THE NORTH CAROLINA SALES AND USE TAX ACT UPON *THE VILLAGE ADVOCATE* VIOLATE ANY GUARANTEES OF FREEDOM OF SPEECH AND PRESS IN THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. DOES APPLICATION OF THE NORTH CAROLINA SALES AND USE TAX ACT TO *THE VILLAGE ADVOCATE* VIOLATE THE FOURTEENTH AMENDMENT GUARANTEE OF EQUAL PROTECTION OF THE LAW?

PARTIES

In the North Carolina Supreme Court, the parties were: Village Publishing Corporation, Appellant, and the North Carolina Department of Revenue, Appellee.

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NORTH CAROLINA DEPARTMENT OF REVENUE,
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On Appeal From The
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MOTION TO DISMISS APPEAL

Pursuant to the authority of Rule 16 and in the manner provided by Rules 33 and 42 of the Rules of the Supreme Court, the North Carolina Department of Revenue moves to dismiss the appeal of Village Publishing Corporation on the basis of the facts and authorities hereinafter set forth for the court's consideration.

OPINION BELOW

The opinion of the Supreme Court of North Carolina is reported at 312 N.C. 211 (1984).

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JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(2).

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STATEMENT OF THE CASE

Appellant, Village Publishing Corporation, publishes in North Carolina *The Village Advocate* (hereinafter "The Advocate"), a weekly "shoppers guide" publication consisting primarily of commercial and classified advertisements, but also containing a limited number of other items, including school lunch menus, sporting events schedules, and announcements of local public interest, which it distributes free of charge to individuals residing in Chapel Hill and Carrboro, North Carolina. The Advocate was actually printed in Virginia and sold to appellant by Womack Press, a Virginia corporation. Pursuant to The North Carolina Sales and Use Tax Act, specifically N.C. Gen. Stat. §§ 105-164.4 and 105-164.6, such sales to appellant were subject to "use" taxation, absent any applicable statutory exemption, and consequently, on or about June 12, 1978, appellee issued proposed use tax assessments against the appellant in respect to its purchases from Womack Press of such printed materials.

Through various administrative proceedings and before the trial court and intermediate appellate court, the appellant has protested the imposition of use tax liability, contending that The Advocate constitutes a "newspaper," and should be allowed to qualify for the statutory sales and use tax exemption afforded by N.C. Gen. Stat. § 105-164.13(28), providing in pertinent part for an exemption for *sales* of newspapers "by newspaper carriers making door to door deliveries." The Advocate is not "sold," but is instead distributed without charge. Upon further appeal, the North Carolina Supreme Court found "it unnecessary to address this issue" (whether The Advocate constituted a "newspaper" within the meaning of the statutory exemption), "assumed" that it did so qualify, but proceeded to sustain the assessment of taxes against appellant's First Amendment and Equal Protection challenges. From the opinion of the Supreme Court of North Carolina entered November 6, 1984, appellant's Notice of Appeal was filed January 29, 1985.

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REASONS WHY THE APPEAL SHOULD BE DISMISSED

I. The Decision Of The North Carolina Supreme Court Is Fully Consistent With The First Amendment.

As does a majority of the other States, North Carolina complements its sales tax with a use tax in order to prevent avoidance of the sales tax by individuals purchasing personal property outside North Carolina for storage, use or consumption in the State. North Carolina's sales tax

and use tax "taken and applied together, provide a uniform tax upon either the sale or use of all tangible personal property irrespective of where it may be purchased." *Johnston v. Gill,* 224 N.C. 638, 644, 32 S.E.2d 30, 33 (1944). The constitutionality of the use tax per se is no longer an open question. *Henneford v. Silas Mason Co.,* 300 U.S. 577 (1936); *Nelson v. Sears, Roebuck Co.,* 312 U.S. 359 (1940). Nevertheless, appellant alleges that imposition of North Carolina's use tax to it abridges its freedom of speech and asserts that "this case is similar to the case of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983) . . . ." (Jurisdictional Statement, p. 18).

But the facts at bar are in stark contrast to those construed by this court in *Minneapolis Star.* There, Minnesota had promulgated a sales and use tax exemption for periodic publications. Then, through a series of legislative amendments, the general taxation scheme was amended so that retail *sales* of such publications remained exempt, but there was levied a special *use* tax on the cost of "paper and ink" consumed in the production of a publication, but this extraordinary tax was itself further narrowed in scope by the promulgation of an exemption for the first $100,000 in cost of such ink and paper.

This court held such a taxation scheme unconstitutional, finding that Minnesota had "created a special tax that applies only to certain publications protected by the First Amendment." *Minneapolis Star* at 581. As a result of a series of amendments to Minnesota's complementary sales and use tax scheme, "ink and paper" had become

the only items subject to the State's use tax where the retail sale of their manufactured product was exempt. *Minneapolis Star* at 578. Minnesota had chosen not to apply its general sales and use tax to newspapers. "By creating this special use tax, which to our knowledge, is without parallel in the State's tax scheme (later characterized as Minnesota's 'ink and paper tax'), Minnesota has singled out the press for special treatment," *Minneapolis Star* at 582.

Unlike Minnesota, North Carolina does not have a specific ink and paper tax, but instead has enacted a general system of uniform taxation upon the sale or use of all tangible personal property within its taxing jurisdiction. *Johnston v. Gill, supra,* at 638. In contrast to the Minnesota statute, the North Carolina act is not targeted at "the press," or upon the privilege of disseminating information to the public. Rather, the North Carolina levy is merely a general tax, applying to all persons, whatever their business, who sell or use tangible personal property, and constitutes precisely the type of generally applicable "economic regulation" which has been consistently upheld by this court. As was held in *Minneapolis Star* at 583: "It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems." Having failed to show that North Carolina in its general system of complementary sales and use taxation somehow singles out the press for disparate taxation, appellant has failed to manifest a constitutional question before this Court, and its appeal should be dismissed.

II. The Decision Of The North Carolina Supreme Court Does Not Deny Appellant Equal Protection.

N.C. Gen. Stat. § 105-164.13(28) in pertinent part provides an exemption from the State's uniform sales and use tax levy for "sales of newspapers by resident newspaper street vendors and by newspaper carriers making house-to-house deliveries. . . ." In its allegations before this court contending constitutional denial of equal protection because the manner in which it has elected to conduct business does not fall within the ambit of the statutory exemption, appellant sets up certain straw men in inadequately attempting to define the issues before the court in terms of the scope of the statute. As held by the court below, the exemption does not solely classify newspapers according to whether they are paid circulation or free circulation, but classifies also upon "the basis of the method of distribution." *In re Assessment of Taxes Against Village Publishing Corp.*, 312 N.C. 211, 220 (1984). The highest state court's construction of a state statute is binding upon the United States Supreme Court, *Eisenstadt v. Baird*, 405 U.S. 438, 442 (1972), and it is not the function of the Supreme Court to construe a state statute contrary to the construction given it by the highest court of a state. *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 837 (1978).

Therefore, the legislative distinction under review does not attempt to classify per se between "free circulation newspapers" and "traditional paid circulation newspapers," as implied by appellant. (Jurisdictional Statement, p. 20). Thus all newspapers actually sold by their publisher, or sold by or at retail establishments, or sold in-

trastate through the mail, are taxed similar to the appellant. If a publisher of "sold" newspapers also distributes a free newspaper which it purchases from another, it is taxed as has been the appellant; if such a publisher itself prints a free circulation newspaper, it would pay a tax upon the cost of the component parts, the ink and paper, used therein. N.C. Gen. Stat. § 105-164.6.

Nor as may be inferred from the appellant's broadside contentions does the availability of the exemption depend upon the publication's particular "content," "commercial" as in the case of The Advocate or otherwise. (Jurisdictional Statement p. 19). Whatever may be the content of appellant, the court below found same to be within the scope of the exemption, holding: "We assume, arguendo, that the *Advocate* is a newspaper within the meaning of the exemption as argued by appellant." *Village Publishing Corp., supra*, at 216.

Equally, inapplicable is appellant's reminder to this court that "any tax which burdens only a small group of newspapers is suspicious." (Jurisdictional Statement, p. 24), citations omitted. The exemption in question is in no respect dependent upon volume of circulation or upon any criterion of size. Nothing in the record compiled in the proceedings below suggests that appellant is among a majority, or a minority, in failing to qualify for the preferential tax treatment sought.

Instead, North Carolina's complementary sales and use taxation scheme classifies "on the basis of the method of distribution," *Village Publishing Corporation, supra*, at 220, which upon the record herein is "rationally related to furthering a legitimate state interest." *Massachusetts*

Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976). "In taxation, even more than in other fields, legislatures possess the greatest freedom in classification," *Madden v. Kentucky,* 309 U.S. 83, 88 (1940), and tax classifications need merely "rest upon some reasonable consideration of difference or policy." *Allied Stores of Ohio, Inc. v. Bowers,* 358 U.S. 522, 527 (1959). Since the appellee has shown in its discussion under Part I herein that the statute is general and uniform in its application and does not burden a suspect group or a fundamental interest, no heightened judicial scrutiny is necessary, and the statute in order to withstand constitutional challenge need possess only a rational basis to its classification. *Vance v. Bradley,* 440 U.S. 93, 97 (1979). "In the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *New Orleans v. Dukes,* 427 U.S. 297, 303-304 (1976).

The rationality and reasonable economic interest served by the enactment of a limited exemption for sales of newspapers by newspaper carriers making door-to-door deliveries is found in the reasonable likelihood that such sales will be made by minors acting as independent agents from whom strict compliance with formal, monthly reporting requirements may be prohibitively costly for the Department of Revenue to police or administer, and for whom technical compliance by virtue of age or business experience may be unduly burdensome, or in part, impossible. Appellant improperly chides the decision below for "speculating" as to reasons underlying the statutory classification. (Jurisdictional Statement, pp. 28 and 29). "The State is not compelled to verify logical assumptions with

statistical evidence," *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 812 (1976), and "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." *Vance v. Bradley, supra,* at 111. Giving judicial deference which decisions of this court require to the reasonable economic classification made by the North Carolina Legislature, appellant has failed to establish a denial of equal protection.

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CONCLUSION

Based upon the foregoing argument and authorities, the North Carolina Department of Revenue respectfully submits that the appellant's appeal should be dismissed as it does not present for review any substantial federal question.

Respectfully submitted,

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